

22082

IN THE  
UNITED STATES COURT  
OF APPEALS

FOR THE NINTH CIRCUIT

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BRYAN ALAPERET and LAURIE ALAPERET,  
by KAREN ALAPERET, as Guardian ad Litem,  
and KAREN ALAPERET,  
*Plaintiffs-Appellants,*

vs.

~~Civil Action No. 795~~

W. D. PHELPS, d/b/a PHELPS PUMP  
AND EQUIPMENT COMPANY,  
*Defendant-Appellee.*

---

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF NEVADA

---

APPELLANTS' APPENDIX

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FILED

NOV 13 1967

WISTI, JAASKELAINEN & SCHROCK  
*Attorneys for Plaintiffs-  
Appellants.*

Business Address:

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Hancock, Michigan 49930

WM. B. LUCK, CLERK

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AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W.,  
GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

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DEPOSITION OF DEFENDANT'S WITNESS, MELVIN  
DALE BRINER, DATED JANUARY 18, 1966

QUESTIONS BY MR. SCHROCK:

\* \* \*

(43)

Q. Have you ever run into a problem such as you had here —

A. Never.

Q. — before? Had you ever run into a problem similar to that in some of the smaller sizes again where you weld the pipes?

A. No.

Q. This is the first time it has ever happened?

A. First time.

Q. Do you have any idea, does Phelps employ any other driller other than yourself?

A. I am the only one that has been there steady over this period of time, but he has employed other drillers.

Q. Have you ever had any discussions with these other drillers with respect to this type of thing happening where you have a fracture in the pipe?

A. I might have, might have.

Q. Had you ever heard of a situation like this occurring prior to the time that it did occur to you?

A. You will have to explain that a little.

Q. Well, did anyone ever — had you ever been in any discussion with any other drillers who had mentioned that they had had this sort of thing happen that there was a fracture in the pipe that had to be repaired?

(44)

A. No.

\* \* \*

DEPOSITION OF DEFENDANT'S WITNESS, EDWARD  
LEE FOWLER, TAKEN JANUARY 18, 1966

QUESTIONS BY MR. SCHROCK:

\* \* \*

(1)

Q. And what is your position with the Phelps Pump and Equipment Company?

A. I am the welder.

Q. And how long have you been employed by Phelps?

A. Three years now — about three years.

Q. As a welder for Phelps, are you attached to any particular crew, or just where they send you?

A. Just wherever they send me.

Q. What general type of work do you — welding work, do you do for Phelps?

(2)

A. Well, mostly maintenance on their equipment.

Q. Mostly maintenance?

A. Yes.

Q. This would be in the yard itself?

A. Well, at times, yes, and if something breaks on the rig at the sites, well, then I have to go to the sites, wherever the well sites are, or the pump equipment, wherever it is.

Q. Do you know how many welders Phelps employed?

A. Well, now, what do you mean — you mean employed as welders?

Q. Yes, as welders.

A. Well, I am the only one as a welder.

Q. Do you take care of all of the welding so far as the casings are concerned, too, when they are inserted in the wells?

A. Yes, I do.

Q. And the maintenance of the equipment?

A. Right.



*Deposition of Edward Lee Fowler*

Q. What did you — for whom did you work prior to the time that you came to work for Phelps?

A. Buck's Welding Shop here in Las Vegas.

Q. In Las Vegas — and how long did you work for them?

A. Oh, about a year, I would say.

Q. What type of welding work did you do there?

A. Well, that consisted of maintenance of boat trailers and (3) just about anything that would come in.

Q. Was this —

A. General welding.

Q. Was this a special type of welding shop?

A. No, I wouldn't say that it is. It is just acetylene welding.

Q. Work was brought in there?

A. Right, it was brought to the shop.

Q. Did you ever have to go out on a job or anything?

A. I went out on two jobs, I think — it was mostly inside work there.

Q. Repair type work?

A. Yes.

Q. Are you acquainted with the General Machine Shop?

A. No, I am not — other than this situation here.

Q. Well, now, what I wondered, if this shop where you had worked was of a similar nature, whether or not you knew?

A. No, the shop that I worked was smaller than General Machine. Now, from what I see of General Machine, I think they are a bigger organization.

\* \* \*

(6)

Q. The welding that you have done at this well site consisted of what?

(7)

A. Of welding the conductor pipe, or this casing, as we refer to it — I weld the joints together, and then we would place that one in the ground, and then another

4a  
*Deposition of Edward Lee Fowler*

on top, and we would weld that around and place it into the ground.

\* \* \*

(8)

Q. Where are the sections located at the time that you weld them?

A. At the time that I weld them, well, there will be one or more in the ground protruding outside the ground, and then I place this from the second one onto whatever number that we use, and I will make a weld around it. Then that one is let into the hole and then stopped by clamps until we put the other section on top of that.

\* \* \*

(9)

Q. And then are the ends of those sections butted together?

A. Yes, they are.

Q. And then what do you do?

A. Then I weld them.

Q. You weld them around the outside?

A. Right.

Q. You run a continuous weld?

A. A continuous weld from the outside.

Q. What type of equipment do you use?

A. A portable welding machine.

Q. Is this a standard type of machine?

A. Yes, sir.

(10)

Q. What type of equipment did Mr. Alaperet use?

A. He had —

Q. So far as the welding is concerned.

A. The machinery was about the same as what I have — it is a portable welding machine on a truck.

Q. On a truck?

A. Yes.

Q. Now, how is this operated — is this by electricity?

A. How is what operated — the machinery?

*Deposition of Edward Lee Fowler*

Q. The welding machine, yes.

A. No, it is driven by a gasoline engine, and it is actually a generator which makes the electricity that you use to weld with.

Q. I see. And you run a continuous weld around the section of the pipe?

A. The outside, yes.

Q. Approximately how far above the ground is the one section protruding when you weld the second section on there?

A. Oh, it varies from two to four foot.

\* \* \*

(15)

Q. O.K. This fracture that you observed, was the welding (16) to repair the fracture any different than the welding you conduct in order to connect the casings together—the sections of the casing together?

A. Well, it would be, I believe, because, after all, it was my weld that broke, so evidently it didn't hold, so it would have to be better and in a different way to get that out of there, to get the pipe out.

Q. What do you mean by "better" — does this take a different technique in welding?

A. Well, I will put it this way: It would have had to have been a better weld than what I had on there.

Q. Well, is this the same type of weld that you put on other pipes?

A. Yes, it is.

Q. And it has held before?

A. Yes, it has held before.

Q. The fracture that you observed, what — how did it appear in the mirror, was it offset?

A. There was a separation of the pipe — you could see that the pipe had separated. Now, just how much I don't know, but you could see that there was a separation, and we could tell that it was a break there, but as far as the extent of it, well, we don't know, or I didn't know, or I couldn't see.

*Deposition of Edward Lee Fowler*

Q. Have you ever, in your — how many years' welding experience now actually do you have?

(17)

A. Oh, I guess about eight or nine years.

Q. Have you ever welded separated materials before?

A. Not anything like this, but I have — I have welded separated materials, yes, but different —

Q. In a different position?

A. Yes.

\* \* \*

MR. LEAVITT: Well, I would like to object to that as being speculative and conjectural. How does he know what he is going to, counsel? He has never been (18) confronted by such an experience.

If you want this witness to come up and just start doing a lot of guessing, why — I would like to object to the question.

MR. SCHROCK: He can still go ahead and answer.

MR. LEAVITT: I want him only to answer if he knows what he would do. I don't know how he would. How could he answer, counsel?

MR. SCHROCK: He has welded separated materials before.

MR. LEAVITT: That is what he testified, but he said — already asked and answered, too. He has not welded inside a pipe before, I think was his answer, too.

Q. (By Mr. Schrock): Have you ever worked on large-size culverts which you could walk into?

A. No, I haven't.

Q. When did you observe that this fracture had occurred — was it on November the 30th, or was it prior to that time?

A. The day before.

Q. The day before. Would that have been late in the afternoon, or early in the afternoon, or when, do you recall?

*Deposition of Edward Lee Fowler*

A. No, I don't recall what time of day it was. It was in the daylight hours because we used the mirror in order to see that.

Q. After you observed the fracture, then what did you do?

A. Well, the driller and I discussed what was the method (19) we thought we could fix it, or something, or if we knew someone that could do it. We could do it.

\* \* \*

(21)

Q. You were with Mr. Briner at the time that the General Machine Shop was contacted?

A. Yes.

Q. Now, with whom did you speak at the General Machine Shop?

A. The owner, Mr. —

Q. Would that be Mr. McNair?

A. McNair, yes.

Q. What was the substance of that conversation, if you don't remember it verbatim?

A. Well, on a piece of paper we drew him a sketch of our problem as we saw it, and discussed it with him, and he said that he had worked on similar cases at the Test Site, and said that he had a welder that was small enough to go in the pipe, but he hadn't arrived yet, and that it would be solely left up to him as to whether he wanted to accept the job or not.

Q. At what time was this you talked to Mr. McNair, do you know?

A. This was in the morning of —

Q. Of the date this accident happened?

A. Yes.

Q. Do you remember what time?

A. No, I don't remember exactly what time, but it was, I'd say, about 8:00 o'clock — possibly a little later.

Q. So then did you wait at the General Machine Shop until Mr. Alaperet arrived?

8a  
*Deposition of Edward Lee Fowler*

(22)

A. Yes, we did, we waited.

Q. Did you discuss this matter with him?

A. Yes, we did, we discussed it with him and showed him the diagram, also, and we made it clear that this is solely — if he didn't want to accept the job, well, then he didn't have to, but we wanted him to see it first before he made up his mind as to whether or not he wanted to do the job or not.

Q. Was there any discussion held at that time — at the time that you talked to Mr. Alaperet at the General Machine Shop, who was present?

A. Myself, Mr. Briner and Mr. Alaperet and the owner, and there was another person there, but I don't know who he was.

Q. The owner you speak of, you mean the owner of General Machine — Mr. McNair?

A. Mr. McNair.

Q. Was there any discussion with respect as to how the job was to be done?

A. Not that I remember, no. He — Mr. Alaperet said he would bring his own stand or sling or whatever he was going to use to go down into the pipe, and so we left from there and we went back to our shop and discussed it with Mr. Lemon, and then we were to call — call him and tell him when we were back out to the job site, I believe.

Q. While you were in the General Machine Shop, was there (23) any discussion with respect to ventilation of the pipe?

A. No.

Q. None at all?

A. None at all.

Q. Nothing said by anyone?

A. Not that I remember.

Q. Did Mr. Alaperet accept the job, or did Mr. McNair?

MR. LEAVITT: Which I object to as calling for a conclusion. I think he can state what was said. I would like to object to that.



*Deposition of Lloyd Ralph Lemon*

MR. SCHROCK: He mentioned there had been a discussion, and it was up to — they were to discuss this with Mr. Alaperet.

MR. LEAVITT: If you want to ask specific questions, all right, but not conclusions, as to who accepted it.

THE WITNESS: As far as I remember, both accepted.

\* \* \*

DEPOSITION OF DEFENDANT'S WITNESS, LLOYD  
RALPH LEMON, TAKEN JANUARY 18, 1966

QUESTIONS BY MR. SCHROCK:

\* \* \*

(8)

Q. Now, when this casing is installed, is it installed in pieces?

A. In sections.

Q. In sections?

A. Yes.

Q. Then how was this done?

A. It is welded.

Q. Do they what — place one section in at a time?

A. Yes.

Q. And then another section is connected to this?

A. It is welded directly to it to make a continuous length of pipe when installed.

Q. And then how was that inserted into the hole?

A. It is lowered in with the well rig.

\* \* \*

(11)

Q. Now, do you — have you done business before with the General Machine Shop?

A. Not that I recall.

*Deposition of Lloyd Ralph Lemon*

Q. Do you know who contacted the General Machine Shop with respect to having Douglas Alaperet come out there?

A. Our driller — Mr. Briner.

(12)

Q. Why was the General Machine Shop contacted to come out there?

A. Well, I was informed that there was a fracture in the casing, one of the welds had separated. The pipe had become stuck in the hole, couldn't be lowered, so in order to free the pipe, why, was using percussion method of jarring the pipe to get it free from the fill and to extract the pipe from the well, and during this time a fracture occurred. So I was notified that this had happened and at my suggestion, why, we contacted a specialist who would be able to repair this fracture because we couldn't do it from the surface.

Q. Why couldn't you do it from the surface?

A. The fracture itself was 24 foot below the ground level.

Q. Did this take a different type of welding than your welder did?

A. Our welder hadn't performed any of this type of work, and we felt like it was necessary to have a specialist do this type of work.

\* \* \*

(15)

Q. Now, have you ever had an incident such as this occur (16) before in your weld so far as a fracture —

A. No.

Q. — being involved in the casings?

A. No.

Q. Never had it before?

A. Not this nature.

Q. Have you ever had an instance occur wherein it was necessary to do this particular type of work before?

A. No.



Q. This was the first experience that you had had?

A. Yes.

\* \* \*

(28)

Q. Who requested the General Machine Shop to come to the site to reweld this fracture?

A. Well, Mr. Briner went to locate a welding firm that could do this job for us, and he contacted the General Machine Shop and came to me and told me that he had made arrangements with him to perform the work.

Q. Is this type of welding that had to be done any different than the welding of the sections together?

A. Well, we felt like it was.

Q. In what respect?

A. Well, this had to be done on the inside of the casing and had to be a very, very good weld.

\* \* \*

(30)

Q. Did Mr. Briner discuss this fracture in the casing with you —

A. Yes.

Q. — before contacting the General Machine Shop?

A. Yes, he did.

Q. Was this the same day, or a previous day, or what?

A. That morning.

Q. That morning?

A. Yes.

Q. And what directions did you give him?

A. To locate a specialist, someone who could weld this.

\* \* \*

**DEPOSITION OF DEFENDANT'S WITNESS, EDWARD ANTHONY MLYNARCZYK, TAKEN JANUARY 18, 1966****QUESTIONS BY MR. SCHROCK:**

\* \* \*

(6)

Q. Do you have any idea about the reason why Mr. Alaperet was at the scene this day?

A. Yes.

Q. Do you know from your own personal knowledge?

A. Yes, I remember Mr. Lemon and Mr. Briner discussing the situation in the morning.

Q. Where did this take place?

A. This would be at the plant, W. D. Phelps pump yard and, it seemed like it was going to require a specialist to do the job due to the fact that the fracture was approximately 20 feet, or or 24 feet below, and that is about all I remember from the conversation. I remember that (7) they were discussing contacting General Machine — Mr. McNair — to see if he had a specialist that could handle the situation.

Q. What did you observe with respect to the equipment and the — well, with respect to the equipment at the scene when you arrived there on this particular day, November the 30th, 1964?

A. I didn't observe anything unusual. I sort of thought the specialist had everything in hand.

\* \* \*

(16)

Q. Have you, in your knowledge, known of any other circumstances such as this so far as the drilling of wells are concerned, where a fracture has occurred?

A. No, sir.

Q. In this particular field, so far as wells and pumps are concerned, all of your experience has been with Phelps?

A. Yes.

\* \* \*

*Transcript on Hearing for Summary Judgment***TRANSCRIPT ON HEARING FOR SUMMARY JUDGMENT, MAY 12, 1967. HON. ROGER D. FOLEY, JR. PRESIDING**

\* \* \*

(24)

**THE COURT:** This Court is going to grant the motion for summary judgment on the basis of the Court's views stated in the discussion and colloquy here with counsel.

The Court takes the position so that in the event of an appeal that it is clear under the very language of the Nevada Industrial Insurance Act itself, whether or not McNair who did business as General Machine Shop and was the employer of the decedent Alaperet, whether or not McNair was the subcontractor or an independent contractor, the action is barred by the Nevada Industrial Insurance Act.

The Court does not decide at this time whether McNair was an independent contractor or a subcontractor. I don't think it's necessary because I think in either event the action is barred by the Industrial Insurance Act on the theory that by virtue of Section 616.085 subcontractors' employees are barred and a subcontractor includes an independent contractor and therefore employees of an independent contractor such as McNair in this situation.

Now, I'm not going to expand it further. It's unnecessary for this Court to decide any more. So your motion for summary judgment is granted, Mr. Leavitt. And the trial for next Tuesday is vacated, Miss Clerk. You will notify the jurors not to appear.

**MR. WISTI:** Your Honor, may I, not for the purposes of arguing with the Court on its decision, for a clarification (25) if I may, Your Honor?

**THE COURT:** I'll hear what you have to say.

**MR. WISTI:** Do I understand the import of the Court's interpretation of the statute to be that as long as there is any independent contractor or employee of an independent contractor or a subcontractor —

**THE COURT:** No, no, you do not so understand. I'm confining it to the facts of this case, that whether or not

*Transcript on Hearing for Summary Judgment*

Harlan McNair, the employer of the decedent, set the decedent to work on this pipe as a result of which he was seriously injured and died, whether or not the relationship between McNair and Phelps, the defendant in this action, was that of subcontractor or independent contractor, that by virtue of the Simon case and the specific language of the Nevada Industrial Insurance Act, the two sections I referred to, this action is barred: I'm not expanding it beyond that.

MR. LEAVITT: We have lodged the proposed order with the Court, Your Honor.

THE COURT: You have the proposed order?

MR. LEAVITT: It's been lodged with the Court.

THE COURT: May I see it?

MR. LEAVITT: We've placed it in the file.

THE COURT: Now, I'm not going to sign the finding you've presented because there's a finding that McNair was a subcontractor. I don't think it's necessary in this Court's decision, and the reason I denied the motion originally, and I (26) think now erroneously, was that I couldn't decide at that time whether or not it was a subcontract or an independent contract, and I thought that in any event that was a question of fact for the jury to decide. But the position the Court takes now is that regardless of whether in this situation there's an independent contractor or subcontractor, independent contract or subcontract, the action is barred.

MR. LEAVITT: There's also a second proposal, Your Honor.

THE COURT: May I see the summary judgment. I'm not going to sign your finding but I will sign your summary judgment.

MR. LEAVITT: Your Honor may want to cross out one line or two.

THE COURT: There are you, Miss Clerk.

MR. WISTI: Will the judgment be entered as of this date, Your Honor?

THE COURT: Pardon me?

MR. WISTI: Will the judgment be entered as of today?

THE COURT: I've just signed the summary judgment.

**WRITTEN INTERROGATORIES TO THE DEFENDANT,  
W. D. PHELPS, DATED JUNE 21, 1965, AND ANSWERS  
THERETO**

Q1. State the name, address, and capacity with the company of all the employees of PHELPS PUMP COMPANY present at the time of the accident on November 30, 1964.

A. Bill Matlock, address unknown; Ed Fowler, 3212 Osage Ave., Las Vegas, Nevada; Ed Mlynarczyk, 748 Rancho Circle, Las Vegas, Nevada; Lloyd Lemon, 3313 Westleigh, Las Vegas, Nevada; Melvin Dale Briner, 29 Hansen St., Henderson, Nevada.

Q2. State the nature of your contract to repair the fracture and the person, firm, or corporation with whom your company contracted.

A. A contract was made with Harlan McNair, reputed owner of General Machine Shop, to repair a fracture where-by he was to make the repair.

\* \* \*

Q5. Who held title to the real property upon which the accident of November 30, 1964, occurred?

A. It is not known who holds the title to the real property, but it is believed that Las Vegas Valley Water District had an easement on the property.

Q6. State the technical education of all of your employees at the job site.

A. None.

Q7. State the number of years of experience all of the employees at the job site had in their respective jobs.

A. Bill Matlock, unknown; Ed Fowler, approximately 15 years; Ed Mlynarczyk, approximately 15 years; Lloyd Lemon, approximately 15 years, of which 12 years were spent as General Manager; Melvin Dale Briner, approximately 15 years.

\* \* \*

Q9. What employee was in charge of the actual work at the site or scene of the accident?



*Written Interrogatories and Answers of W. D. Phelps*

A. None. Harlan McNair and Douglas Alaperet were in charge of the site at the time of the accident.

Q10. State the names of the employees who contracted General Machine Company to perform the work.

A. Mr. Melvin Dale Briner.

\* \* \*

Q12. Was any special equipment needed to perform this job and if so, describe such equipment?

A. Yes. Special welding equipment.

\* \* \*

Q16. What equipment did your company have at the job site where this accident occurred?

A. A drilling rig.

\* \* \*

Q21. How many welders are in the employ of your company and why did you contract with General Machine Company rather than having one of your own welders perform the work?

A. One welder. The work to be performed was out of his line of work.

\* \* \*

Q26. State whether or not there were any written specifications or plans for this welding job and if so, attach a copy and advise as to the name and address of the person who prepared such plans or specifications.

A. There were none.

\* \* \*

Q29. Describe the area into which the deceased DOUGLAS ALAPERET was lowered to perform the welding job, i.e., depth, width or diameter or circumference and the type of material out of which the area was constructed.

A. The hole had a 20' diameter casing. I am informed that Douglas Alaperet was lowered to a depth of approximately 24'. The material used in the construction was steel.

\* \* \*

*Written Interrogatories and Answers of W. D. Phelps*

Q31. How was DOUGLAS ALAPERET'S welding equipment lowered to him in the area where he was working?

A. I do not know because I was not present, but I am informed that it was lowered by Douglas Alaperet who had the equipment on his person.

\* \* \*

Q37. Did your company bring the oxygen to the job site and if so, how much oxygen was brought to the job site?

A. I do not know because I was not there, but I am informed that none of my employees did.

\* \* \*

Q41. Did you have any correspondence with anyone concerning this job and if so, attach copies of such correspondence?

A. General Machine Shop sent us a bill for \$20.00 and we paid this bill: a copy of the bill, marked PAID, and a copy of the check are attached hereto.

\* \* \*

Q45. Does your company employ any college graduated engineers and if so, state names and addresses of such engineers and the colleges and years graduated with type of degree granted?

A. No.

Q46. What was the job classification of each employee at the job site on the morning of November 30, 1964?

A. Bill Matlock, driller helper; Ed Fowler, welder; Ed Mlynarczyk, field superintendent; Lloyd Lemon, Manager; and Melvin Dale Briner, driller.

\* \* \*

Q50. State the name and address of the person, and his employer, who completed the welding job.

A. The job was not completed.

\* \* \*

*Written Interrogatories and Answers of W. D. Phelps*

Q52. Was an air circulation device of some kind used when the job was completed by another welder and if so, state the manner in which it was provided.

A. The job was never completed.

\* \* \*

(s) Elwin C. Leavitt  
Attorney for Defendant  
229 Las Vegas Boulevard South  
Las Vegas, Nevada

---

STATE OF NEVADA

ss.

COUNTY OF CLARK

W.D. PHELPS, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled action and that he is the owner of PHELPS PUMP AND EQUIPMENT COMPANY; that he has read the foregoing Answers to Interrogatories and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

(s) W. D. Phelps

Subscribed and Sworn to before  
me this 21 day of June, 1965.

Rowena Mitchell  
My commission expires: .....  
Notary Public in and for said County and State.



**AFFIDAVIT OF DEFENDANT'S WITNESS, EDWARD LEE FOWLER, DATED DECEMBER 10, 1965**

EDWARD LEE FOWLER, being first duly sworn according to law, deposes and says:

1. That he is of the age of majority, competent to testify as to facts stated herein and that he has personal knowledge of all facts stated in this Affidavit and that they are true to his own knowledge.

2. That on the 30th day of November, 1964, he was an employee of the defendant W. D. PHELPS and was on the job site near Gowan and Torrey Pines Rd., in the County of Clark, State of Nevada, at the time of the accident referred to in the Complaint and that your affiant saw DOUGLAS ALAPERET and saw him working there.

3. That at said time and place a well was being drilled and constructed for LAS VEGAS VALLEY WATER DISTRICT by defendant W. D. PHELPS, pursuant to a contract between the said District and defendant W. D. PHELPS.

4. That said work site is the same site at which DOUGLAS ALAPERET was injured and that your affiant observed him at the site.

5. That the work being performed by DOUGLAS ALAPERET when he was injured was being done pursuant to an agreement and contract with HARLAN McNAIR.

6. That HARLAN McNAIR told MELVIN DALE BRINER he would furnish certain equipment, furnish one of his employees, DOUGLAS ALAPERET, and complete the repair of a fracture inside the casing of the well at the said site.

7. That MELVIN DALE BRINER and your affiant were employees of the defendant W. D. PHELPS at the time and MELVIN DALE BRINER was actually working for defendant W. D. PHELPS.

8. That MELVIN DALE BRINER told HARLAN McNAIR that W. D. PHELPS would pay for the job when

*Affidavit of Edward Lee Fowler*

the job was completed, and this was said before DOUGLAS ALAPERET was injured.

(s) Edward Lee Fowler

Subscribed and sworn to before me this 10th day of December, 1965.

Mildred H. Leavitt  
Notary Public in and for said  
County and State.

**AFFIDAVIT OF DEFENDANT'S WITNESS, EDWARD LEE  
FOWLER, DATED JANUARY 14, 1966**

EDWARD LEE FOWLER, being first duly sworn according to law, deposes and says:

1. That he is of the age of majority and competent to testify as to the facts stated herein, that he has personal knowledge of all the facts contained herein, and that they are true of his own knowledge.

2. That the work being performed by DOUGLAS ALAPERET at the time he was injured on the 30th day of November, 1964, for and on behalf of his employer, was work in fulfillment of the same contract of defendant W. D. PHELPS with LAS VEGAS VALLEY WATER DISTRICT, as referred to in the other affidavits herein.

3. That on the 29th day of November, 1964, your affiant noticed an improper movement in the pipe at the well site being completed pursuant to said contract. By the use of a mirror reflecting the sunlight, affiant was able to see there was a break and fracture in the pipe.

4. That your affiant then knew the well could not be completed by the completion of the well in fulfillment of the contract of Defendant W. D. PHELPS with LAS VEGAS VALLEY WATER DISTRICT unless the fracture could be properly fused. That in order to properly fuse said pipe, it would be necessary to go inside the

*Affidavit of Edward Lee Fowler*

pipe because the pipe could not be raised from the hole, and the pipe would have to be fused on the inside by welding.

5. That in order to properly fuse said fracture in the pipe, it was necessary to contract for a welding firm to perform this work in order to complete the said contract as said well site.

6. That pursuant to the sub-contract and agreement entered into between the defendant, acting by and through MELVIN D. BRINER and HARLAN McNAIR, as set forth in the previous affidavit of your affiant, your affiant saw the said DOUGLAS ALAPARET while he was actually in the performance of said work in fulfillment of the contract with defendant W. D. PHELPS and LAS VEGAS VALLEY WATER DISTRICT at the job site on the 30th day of November, 1964, at the time the said DOUGLAS ALAPARET was injured.

7. That your affiant previously stated in his affidavit that the said DOUGLAS ALAPARET was to complete the repair of a fracture, and said work was referred to as repair work and consisted of the fusion of a conductor pipe, which is also known as casing (although not referred to as casing by the terms of said contract), and is also referred to as pipe herein. That said work attempted to be performed by the said DOUGLAS ALAPARET was necessary to complete said well to fulfill the contract of defendant W. D. PHELPS with LAS VEGAS VALLEY WATER DISTRICT, and it was not intended by your affiant to refer to the repair in a limited sense. It was repair work because the previous weld had broken.

8. That said work being performed by defendant DOUGLAS ALAPARET was work necessary to fulfill a part of said contract entered into between said defendant W. D. PHELPS and LAS VEGAS VALLEY WATER DISTRICT by reason of the fact that said work had to be performed before said well could be completed pursuant to said contract.

9. That by reason of the fact that the said DOUGLAS ALAPARET did not complete the work for and on behalf of his employer, the well could not be completed in fulfillment of the said contract between defendant W. D.

*Affidavit of Lloyd Ralph Lemon*

PHELPS and LAS VEGAS VALLEY WATER DISTRICT, and defendant W. D. PHELPS was forced to and did commence the drilling of an entirely different well near the same site so as to fulfill said contract.

(s) Edward Lee Fowler

Subscribed and sworn to before me this 14th day of January, 1966.

Mildred H. Leavitt  
Notary Public in and for said  
County and State.

(SEAL)

**AFFIDAVIT OF DEFENDANT'S WITNESS, LLOYD  
RALPH LEMON, DATED JANUARY 14, 1966**

LLOYD RALPH LEMON, being first duly sworn according to law, deposes and says:

1. That he is of the age of majority and competent to testify to matters herein, and that he has personal knowledge of all the matters stated herein.

2. That on the 4th day of November, 1964, your affiant was an employee of W. D. PHELPS, the defendant herein, and that he has been ever since said date, and is now, an employee of said defendant.

3. That the portions of the agreement referred to in Article 4 of the agreement which is attached to the affidavit of W. D. PHELPS, save and except for the instructions to bid and the specifications and drawings and some other addenda, are attached to this Affidavit and are a part of the agreement attached to the Affidavit of W. D. PHELPS and are designated as follows:

(a) LAS VEGAS VALLEY WATER DISTRICT  
NOTICE INVITING BIDS FOR DRILLING  
WELL NO. 29.

(b) WELLS — SPECIAL CONDITIONS.

*Affidavit of Lloyd Ralph Lemon*

- (c) PROPOSAL.
- (d) PROPOSAL BIDDING SHEET.
- (e) LAS VEGAS VALLEY WATER DISTRICT STANDARD SPECIFICATIONS S-11 FOR DRILLING WATER WELLS BY CABLE TOOL METHOD.
- (f) LAS VEGAS VALLEY WATER DISTRICT SPECIFICATION NO. G-2.

4. That each and every item attached hereto is a part of the contract entered into by the defendant to drill a well at the place described in the Affidavit of W. D. PHELPS.

5. That pursuant to said documents, the defendant was required to furnish conductor pipe 20" inside diameter by 5/16" to a depth of 100 feet pursuant to the fourth item of requirements set forth in "WELLS — SPECIAL CONDITIONS."

6. That pursuant to paragraph 3 of LAS VEGAS VALLEY WATER DISTRICT STANDARD SPECIFICATION S-11 FOR DRILLING WATER WELLS BY CABLE TOOL METHOD, it was necessary for defendant W. D. PHELPS to install the conductor pipe of steel so that it would be "joined with continuous welds so made as to avoid angular distortion."

7. That pursuant to paragraph 40(a) of LAS VEGAS VALLEY WATER DISTRICT SPECIFICATION NO. G-2, the said defendant was also required, pursuant to the terms of said contract, to make good all defective work.

8. That the said defendant, in order to fulfill said contract, was required to comply with all of said terms and conditions set forth herein.

9. That by reason of the fact that said defendant was informed that the component parts of the conductor pipe had not been completely fused by welding, the defendant was unable to complete the drilling of said well and had to abandon the same and had to commence drilling another well near the same site in order to fulfill said contract.



*Affidavit of Lloyd Ralph Lemon*

10. That the work of fusing any and all fractures in the conductor pipe used in the well was necessary in order for said defendant to fulfill said contract with the LAS VEGAS VALLEY WATER DISTRICT.

11. That the defendant W. D. PHELPS, when he learned that the decedent had not completed the fusion of the conductor pipe, was compelled to and did abandon the entire drilling operation and construction at said site and re-commenced the drilling and construction of an entirely different well so that he could fulfill the contract with the LAS VEGAS VALLEY WATER DISTRICT, by furnishing 100 feet of conductor pipe "joined with continuous welds," as provided for in said contract and specifications so as to avoid angular distortion.

12. That the contracting for the welding of the fracture in the conductor pipe of said well was ordered and authorized by me for the purpose of fulfilling the contract between the defendant W. D. PHELPS and the LAS VEGAS VALLEY WATER DISTRICT.

13. That at all times mentioned in plaintiffs' Complaint, the defendant W. D. PHELPS maintained, and still maintains, industrial insurance with the Nevada Industrial Insurance Commission on all employees for all persons directly employed by him and paid, and still pays, the premiums for said insurance.

(s) Lloyd Ralph Lemon

Subscribed and sworn to before me  
this 14th day of January, 1966.

MILDRED H. LEAVITT  
Notary Public in and for said County  
and State.

(Notary Stamp)